COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-2891 **Cir. Ct. No. 02-CV-735**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

THE CINCINNATI INSURANCE COMPANY, JOHN SCHWEINER AND CAROL SCHWEINER,

PLAINTIFFS,

V.

DAVID R. VAN LANEN, D/B/A VAN LANEN ARCHITECTS,

DEFENDANT-THIRD-PARTY PLAINTIFF-CO-APPELLANT,

V.

RICHARD J. OTRADOVEC AND BUILDTEC, LLC,

THIRD-PARTY DEFENDANTS-APPELLANTS,

REGENT INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Van Lanen, Richard Otradovec, and Buildtec, LLC, appeal a summary judgment declaring that Regent Insurance Company has no duty to defend Buildtec and Otradovec against Van Lanen's third-party complaint. The appellants contend the circuit court erroneously construed the complaint and therefore erroneously concluded Regent had no duty to defend. Regent, in advocating affirmance of the circuit court's decision, contends the economic loss doctrine precludes Van Lanen's claims.

¶2 We conclude the circuit court drew inappropriate inferences from the complaint. Based on the allegations of the third-party complaint, Regent does indeed have a duty to defend Buildtec. We therefore reverse the portion of the judgment holding otherwise. We conclude that the economic loss doctrine is inapplicable and does not bar Van Lanen's complaint; thus, we affirm that portion of the judgment. Finally, because we determine that Regent had a duty to defend Buildtec and Otradovec, we remand this case for further proceedings to determine Buildtec's attorney fees.

Background

¶3 Van Lanen's third-party complaint alleges the following. John and Carol Schweiner hired him sometime before January 2001 to design a maintenance garage for their golf course. The Schweiners also hired Buildtec to provide "construction management and supervision services." Buildtec sent

employee Richard Otradovec, a construction manager, to the job. The complaint does not specify Otradovec's duties, nor does it allege who performed the actual labor to complete the garage. In January 2001, the garage began to collapse and had to be pulled back into alignment. The garage allegedly failed to conform with several building code provisions.

¶4 The Schweiners filed suit against Van Lanen in April 2002, alleging he was responsible for the damages relating to the collapse. Specifically, the Schweiners alleged Van Lanen negligently prepared the garage design and breached both his contract with the Schweiners and an implied warranty on the design.

¶5 In November 2002, Van Lanen filed a third-party complaint against Buildtec and Otradovec (collectively, "Buildtec") and Buildtec's insurer, Regent, which had issued a commercial general liability policy to Buildtec. Van Lanen alleged Buildtec had negligently provided its "construction management and supervision services." He asserted he would be entitled to contribution from Buildtec in the event that he was held liable to the Schweiners. Van Lanen's third-party complaint fails to state who was responsible for the actual garage construction. In March 2003, Regent moved for summary judgment on the grounds that its policy did not cover the claims Van Lanen asserted against Buildtec. Alternatively, Regent contended that the economic loss doctrine precluded Van Lanen's claims and therefore, there was nothing to defend.

¶6 The circuit court initially granted summary judgment to Regent on the basis of the economic loss doctrine. Application of the doctrine meant Van Lanen was limited to contract or warranty claims, neither of which was pled. The court also determined that a policy exclusion precluded Regent's coverage of

Buildtec. As a result, with Van Lanen's claim extinguished and with coverage precluded, Regent had no duty to defend Buildtec.

¶7 Buildtec moved for reconsideration and Van Lanen filed a similar motion, supported by the Schweiners. The court vacated its original decision and then determined that the economic loss doctrine did *not* apply. It noted that although the economic loss doctrine could be applied to eliminate a claim for damages caused by services incidental to the sale of goods, a "professional's duty of care" exception to the doctrine allowed Van Lanen's negligence claim against Buildtec to survive. However, the court upheld its initial determination that a policy exclusion applied and determined again that Regent had no duty to defend Buildtec.[1] Van Lanen and Buildtec appeal.

Discussion

¶8 We review summary judgments de novo, using the same methodology as the circuit court. ***Machotka v. Village of West Salem***, 2000 WI App 43, ¶4, 233 Wis. 2d 106, 607 N.W.2d 319. The method is well known and need not be repeated here. ***Id.*** We are also required to interpret an insurance policy, which presents a question of law for us to review de novo. ***Smith v. Katz***, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999).

[1] The circuit court granted summary judgment and entered declaratory judgment. It appears that the declaratory judgment simply references the summary judgment and does not reflect a separate proceeding.

Whether Regent Has a Duty to Defend Buildtec—Policy Exclusions

¶9 The circuit court concluded that although the main policy provided coverage for Buildtec's negligence, an exclusion applied to preclude coverage here. Van Lanen argues the court drew inappropriate inferences from the pleadings to arrive at this result. We agree.

¶10 Whether a duty to defend exists is a question of law. *See* ***Professional Office Bldgs., Inc. v. Royal Indem. Co.***, 145 Wis. 2d 573, 580, 427 N.W.2d 427 (Ct. App. 1988). "An insurer's duty to defend is determined by comparing the allegations of the complaint to the terms of the insurance policy." ***Smith***, 226 Wis. 2d at 806. The duty to defend is predicated on allegations in a complaint which, if proven true, would give rise to the possibility of recovery that falls under the terms and conditions of the policy. ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. The duty to defend is based solely on the allegations within the complaint's four corners without resorting to extrinsic facts or evidence, ***id.***, and focuses only on the nature of the claim, not its merits. ***Smith***, 226 Wis. 2d at 806. "The insurer's duty arises when the allegations in the complaint coincide with the coverage provided by the policy." ***Id.*** at 807.

¶11 In this comparison, however, we construe the complaint liberally. ***Fireman's Fund Ins.***, 261 Wis. 2d 4, ¶20. "The duty to defend is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage." ***Id.*** Thus, we will assume all reasonable inferences in the complaint's allegation and resolve any doubts regarding the duty to defend in favor of the insured. ***Id.***

¶12 Van Lanen's complaint alleged that Buildtec was "hired by … John Schweiner, to provide construction management and supervision services" for the garage project and that Buildtec "did in fact provide" those services. Van Lanen claimed that Buildtec, through Otradovec, "was negligent … in his providing of construction supervision services" and that "the negligence … was a proximate … cause of or a substantial factor in causing the partial collapse of the garage." Finally, Van Lanen alleged that he would be entitled to contribution if any damages were awarded because he and Buildtec would essentially be joint tortfeasors.

¶13 The main "insuring agreement" portion of Buildtec's policy with Regent says:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of … "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for … property damage to which this insurance does not apply. …
>
> ….
>
> b. This insurance applies to … "property damage" only if: (1) The … "property damage" is caused by an "occurrence" that takes place in the "coverage territory" ….

¶14 Beginning its analysis, the circuit court concluded that the terms of this main coverage section would ordinarily establish coverage and Regent's duty to defend Buildtec. It observed that Van Lanen had alleged that: (1) both he and Buildtec might become "legally obligated to pay" property damages to the Schweiners; (2) there was "property damage" consistent with the policy's terms; and (3) the damage was caused by an "occurrence;" namely, Buildtec's

negligence.[2] The court determined that these factors, as alleged, were consistent with the policy language of the "insuring agreement" and established coverage.

¶15 After determining initial coverage, the court noted the policy contained multiple exclusions to coverage and examined whether any of them applied here. The court concluded exclusion j(6) precluded coverage. That section excludes coverage for "'Property damage' to … [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." "Your work," as defined by the policy, includes "[w]ork or operations performed by you [the insured] or on your behalf …."

¶16 The court said that Van Lanen had alleged property damage, as defined by the policy, and that it was evident the garage needed to be restored or repaired. Additionally, the court determined that Van Lanen's complaint "sufficiently alleged Buildtec's work within the policy's definition of 'your work.'"

¶17 The circuit court next apparently construed exclusion j(6) to require physical labor on the actual structure, since "your work" must be "performed on" the property in question. We agree with this interpretation of the policy. However, the court then inferred from the complaint that Buildtec must have had individuals working on its behalf on the garage: "If Buildtec was a manager and supervisor, surely someone was performing work on its behalf—the persons it was managing and supervising." Thus, because the garage suffered property damage

[2] In ***Doyle v. Engelke***, 219 Wis. 2d 277, 289-90, 580 N.W.2d 245 (Ct. App. 1998), the insurance policy defined "event" with language identical to Regent's definition of "occurrence." The ***Doyle*** court held that negligent acts fall within the definition of an "event."

that had to be restored or repaired due to work incorrectly performed on it on Buildtec's behalf, the court concluded the exclusion precluded coverage. We disagree because we think the court's inference exceeded the scope of its review.

¶18 The insurer's duty to defend arises when the allegations in the complaint coincide with coverage provided under the policy. ***Smith***, 226 Wis. 2d at 806. Initially, the circuit court concluded, based on Van Lanen's third-party complaint and the insurance policy's main insuring agreement, that there was coverage. This finding is never directly challenged on appeal. The court then examined the policy exclusions and, based on an inference that there were individuals working *on* the garage *on* Buildtec's behalf, concluded exclusion j(6) applied to absolve Regent of a duty to defend. However, there is nothing in the complaint sufficient to trigger this exclusion when comparing the complaint to the policy. Regent itself acknowledges that there were no facts in the complaint alleging subcontractors or others working on Buildtec's behalf.

¶19 All inferences drawn from the complaint must be drawn in favor of the insured. ***Fireman's Fund Ins.***, 261 Wis. 2d 4, ¶20; *see also* ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980) (on a summary judgment motion, doubts about the existence of genuine, material factual inferences are resolved in favor of the nonmoving party.) Thus, while it is logical to infer that there had to be someone responsible for the physical construction of the garage, it is neither appropriate nor mandatory at this stage to assume that someone was working on

Buildtec's behalf.[3] It is entirely possible, for instance, that the Schweiners hired all the relevant construction personnel, who would then be working on the Schweiners'—not Buildtec's—behalf. Based on the allegations in the complaint and the insurance policy language, we conclude exclusion j(6) does not apply and does not relieve Regent of its duty to defend Buildtec.

¶20 Regent suggests, however, that three other exclusions apply. The first is exception j(5), which excludes coverage for property damage to:

> That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations ….

However, this exclusion, like exclusion j(6), implies physical work *on* the structure. For the same reasons that j(6) does not apply, j(5) does not apply.

¶21 Regent next argues that exclusion (l) applies. This clause excludes coverage for property damage "to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" Regent argues that the complaint "alleged that the damage occurred after the building was constructed … so the work is within" the hazard and "clearly, damage to any of Buildtec's work" would therefore be excluded. Whatever Buildtec's work was, it was intangible at best. As the moving party, Regent failed to adequately explain how Buildtec's

[3] As Buildtec points out in its brief, the scope of its "construction management and supervision services" cannot be determined from Van Lanen's complaint. It is possible to infer, as the circuit court did, that there were individuals working on Buildtec's behalf since it must have been managing or supervising something or someone. But as Buildtec argues, it is also possible to infer that Buildtec was limited to coordinating services, such as accepting deliveries or scheduling subcontractors, since no related facts were alleged. Without details in the complaint, the difference between these two inferences is that the former arguably precludes finding coverage while the latter permits finding coverage. However, when we are determining the duty to defend, we have an obligation to use inferences that allow a finding of coverage.

work—its "construction management and supervision services"—suffered property damage.

¶22 Exclusion (k) excludes coverage for "property damage" to the insured's "product." Regent argues that the garage is the product. However, nothing in the complaint suggests Buildtec was hired to produce the garage. We are therefore unconvinced that *Buildtec's* product in this case was the garage, and we conclude this exception is inapplicable as well.

¶23 None of the exclusions applies when we compare the complaint to the insurance policy. Because we construe the policy to provide coverage at this stage, Regent had a duty to defend Buildtec under the policy terms.

Whether Regent Has a Duty to Defend Buildtec—Economic Loss Doctrine

¶24 In considering whether Regent had a duty to defend Buildtec, the circuit court examined whether the economic loss doctrine applied. The court initially held the doctrine applied, effectively preventing Van Lanen from recovering against Buildtec by extinguishing his claim. With no valid claim against it, Buildtec would not need Regent's defense. On reconsideration, the court determined that an exception to the doctrine was applicable, allowing Van Lanen's claims to survive. Regent argues the court was correct the first time and for that reason, we should affirm the judgment that it has no duty to defend Buildtec.

¶25 "The economic loss doctrine precludes a purchaser of a product from employing negligence or strict liability theories to recover from the product manufacturer loss which is solely economic." ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245-46, 593 N.W.2d 445 (1999). It does not

prohibit recovery of damages based in contract or warranty. Economic loss is "damage to a product itself or monetary loss caused by the defective product, which does not cause personal injury or damage to other property." As the court noted, the doctrine also bars claims for negligent provision of services incidental to the sale of a product. *See* ***Biese v. Parker Coatings, Inc.***, 223 Wis. 2d 18, 28-29, 588 N.W.2d 312 (Ct. App. 1998).

¶26 The court concluded that Buildtec's "[s]upervising the construction of a maintenance garage is surely incidental to its construction and sale. Thus Van Lanen's Third-Party Complaint does allege [unrecoverable] economic loss." The court then considered whether an exception to the economic loss doctrine applied and concluded that, under ***Milwaukee Partners v. Collins Eng'rs***, 169 Wis. 2d 355, 363 n.3, 485 N.W.2d 274 (Ct. App. 1992), Buildtec might be a professional "liable in tort for economic damages irrespective of whether there is a contractual relationship between the parties" because of a breach of a professional duty of due care. Construing Buildtec as an alleged professional based on Van Lanen's complaint, the court concluded the economic loss doctrine was inapplicable and did not extinguish Van Lanen's negligence claims against Buildtec.

¶27 Application of the economic loss doctrine is a question of law that we review de novo. ***Insurance Co. of N. Am. v. Cease Electric, Inc.***, 2004 WI App 15, ¶19, 269 Wis. 2d 286, 674 N.W.2d 886, *petition for review granted*, 2004 WI 20, 269 Wis. 2d 197, 675 N.W.2d 804 (Feb. 4, 2004) (No. 03-0689). We agree that the economic loss doctrine does not apply here, but for a different reason than that relied upon by the circuit court.

¶28 Van Lanen's complaint alleged that Buildtec was hired to provide "construction management and supervision services," not goods. Nothing pled

suggests that Buildtec was responsible for providing or assembling the construction materials into the garage. "Our supreme court … has allowed purely economic damages stemming from negligence claims involving parties who predominately provide services …." ***Id.***, ¶23. Thus, the economic loss doctrine has not been expanded to services[4] and does not apply here to preclude recovery or insurance coverage.

¶29 To the extent Regent claims "the [***Cease Electric***] decision is incorrect … and this Court should apply the economic loss doctrine to claims for negligent performance of services," we disagree. This court is primarily an error-correcting court, not a law-declaring court. ***Cook v. Cook***, 208 Wis. 2d 166, 188-89, 560 N.W.2d 246 (1997).

¶30 Because neither the policy exclusions nor the economic loss doctrine apply in this case to preclude coverage, Regent had a duty to defend Buildtec. In determining the duty to defend, we look only at the complaint—we do not consider extrinsic facts. ***Fireman's Fund Ins.***, 261 Wis. 2d 4, ¶19. While it might ultimately have been determined that there were facts justifying an exclusion—thereby relieving Regent of a duty to *indemnify* Buildtec—those facts were not pled in Van Lanen's complaint. Thus, summary judgment was erroneous because, in comparing the allegations in the complaint to the insurance policy

[4] *See* ***Insurance Co. of N. Am. v. Cease Electric, Inc.***, 2004 WI App 15, 269 Wis. 2d 286, 674 N.W.2d 886. While the circuit court relied on ***Biese v. Parker Coatings, Inc.***, 223 Wis. 2d 18, 28-29, 588 N.W.2d 312 (Ct. App. 1998), that case referred to services incidental to the sale of goods. There, the economic loss doctrine applied to a company that had installed flooring because the court concluded the company's main business was the sale of flooring materials, not the installation services. Thus, the services were merely *incidental* to the sale of goods. Here, the only allegation of what Buildtec provided is that it provided services; nothing suggests it sold any sort of goods.

language, Regent at least had a duty to defend Buildtec even if it would have later been relieved of a duty to indemnify.

Attorney Fees

¶31 Buildtec requests that we determine it is entitled to attorney fees because of Regent's failure to defend. The circuit court denied the request for fees because it concluded Regent had not breached its duty to defend. Whether an insured can recover attorney fees is a question of law we review independently of the circuit court. ***Ledman v. State Farm Mut. Auto. Ins. Co.***, 230 Wis. 2d 56, 69, 601 N.W.2d 312 (Ct. App. 1999).

¶32 "An insurer does not breach its contractual duty to defend by denying coverage where the issue of coverage is fairly debatable as long as the insurer provides coverage and defense once coverage is established." ***Elliott v. Donahue***, 169 Wis. 2d 310, 317, 485 N.W.2d 403 (1992). For this reason, Regent asks us to remand and allow it to provide a defense to Buildtec in the event we reverse the circuit court's determination that Regent had no duty to defend Buildtec.

¶33 However, the supreme court

> indicated that an insurer can avoid the risk of breaching the duty to defend by seeking bifurcation of the coverage and liability issues, and a stay of the liability phase until coverage has been decided. … Where an insurer fails to follow that procedure … the insurer does indirectly what it cannot do directly. The insurer breaches the duty to defend by requiring the insured to incur attorney fees to defend him or herself on the issue of liability and to litigate coverage simultaneously.

Reid v. Benz, 2001 WI 106, ¶3, 245 Wis. 2d 658, 629 N.W.2d 262 (citing ***Mowry v. Badger State Mut. Cas. Co.***, 129 Wis. 2d 496, 528-29, 385 N.W.2d 171

(1986)). Thus, where an insurer fails to request (1) bifurcation of the coverage and liability issues and (2) a stay of the liability proceedings until the coverage question is resolved, we permit, because of the equity involved, the insured to recover attorney fees incurred in both the defense of the liability phase as well as in the litigation of the coverage issue. *See e.g.*, ***Reid***, 245 Wis. 2d 658 ¶¶19-20; ***Elliott***, 169 Wis. 2d at 318, 325.

¶34 In other words, Buildtec is lawfully entitled to recover its attorney fees if, indeed, Regent failed to comply with the ***Mowry*** mandate set out in ***Reid***. The appellate record is incomplete as to events occurring after this appeal was taken. Thus, we are not in a position to determine whether Regent in fact complied with ***Mowry***. Moreover, the actual amount of an award of attorney fees is discretionary with the trial court. For that reason, we remand this case to the circuit court for further proceedings. The circuit court is to determine whether Regent complied with the mandates of ***Mowry***—bifurcation and stay—and, if not, the attorney fees to which Buildtec may be entitled.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.